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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM B. AND JO ANN AKERS,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When the highest and best use of a large tract of land is subdivision and sale as individual parcels, does 26 C.F.R. §1.170A-1(c)(2) require the property to be valued as the sale of a single tract defined by its legal boundaries, or does 26 C.F.R. §1.170A-1(c)(2) permit the property to be valued as the aggregate sales of the individual subdivided lots?

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OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals in this case is reported at 799 F.2d 243 and is set forth in its entirety in the Appendix hereto at 23a-30a. The opinion of the Tax Court, affirmed by the Sixth Circuit, is reported as *Akers v. Commissioner*, 48 T.C.M. 1113-21, ¶84,490 P-H Memo T.C. 1964-84. (1984).It is set forth in its entirety in the Appendix at 1a-21a.

GROUNDS FOR JURISDICTION

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the

Sixth Circuit on August 20, 1986, and judgment was entered on that date. Petitioners did not file a petition for rehearing in the Sixth Circuit. In accordance with 28 U.S.C. §2101(c), this petition was filed within ninety days of the date judgment was entered. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following Sections of the Internal Revenue Code of 1954, as amended, 26 U.S.C. (the "Code"), and of 26 C.F.R., promulgated pursuant thereto, as in effect on June 1, 1977, are involved in this case:

26 U.S.C. §170(f)(3) provides in relevant part:

> (3) Denial of deduction in case of certain contributions of partial interests in property.—
>
> (A) In general—In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust.
>
> * * *
>
> (B) Exceptions.—Subparagraph (A) shall not apply to a contribution of—
>
> * * *
>
> (iii) a lease on, option to purchase, or ease-

ment with respect to real property of not less than 30 years' duration granted to an organization described in subsection (b)(1)(A) exclusively for conservation purposes.

* * *

(C) Conservation purposes defined.—For purposes of subparagraph

(B), the term "conservation purposes" means—

(i) the preservation of land areas for public outdoor recreation or education, or scenic enjoyment;

(ii) the preservation of historically important land areas or structures; or

(iii) the protection of natural environmental systems.

26 C.F.R. §1.170A-1(c). **Value of a contribution in property.**

(1) If a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of contribution reduced as provided in section 170(e)(3) and paragraph (a) of §1.170A-4, or section 170(e)(3) and paragraph (c) of §1.170A-4A.

(2) The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. If the contribution is made in

> property of a type which the taxpayer sells in the course of his business, the fair market value is the price which the taxpayer would have received if he had sold the contributed property in the usual market in which he customarily sells, at the time and place of the contribution and, in the case of a contribution of goods in quantity, in the quantity contributed. The usual market of a manufacturer or other producer consists of the wholesalers or other distributors to or through whom he customarily sells, but if he sells only at retail the usual market consists of his retail customers.

STATEMENT OF THE CASE

In 1965, William B. and JoAnn Akers ("Petitioners") acquired approximately 1,260 acres of unimproved real property in Cheatham County, Tennessee from the Treanor family. ("Treanor tract") (799 F.2d at 244).[1] On June 1, 1977, the improvements to the Treanor tract consisted of two retreat dwellings, each with a separate driveway, dam and lake. (T.C. at 8-9).

Adjoining the Treanor tract is a residential subdivision known as the Interstate West Ranchettes ("Ranchettes") (T.C. at 6). Prior to June 1, 1977, Petitioners also purchased thirty-one individual lots in that subdivision, totaling approximately 81.51 acres. (T.C. at 6). It is indiscernable to the human eye where

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[1] All references to the Tax Court opinion shall be cited as T.C. at ____. All references to the Sixth Circuit opinion shall be cited as 799 F.2d at ____. Both opinions are set forth in their entirety in the Appendix hereto.

the Treanor tract ends and the Ranchettes begin, although the Ranchettes have been legally platted into thirty-one individual lots ranging in size from 2 to 5.90 acres. (T.C. at 6).

On June 1, 1977, the highest and best use of the Treanor tract was as retreat sites in parcels large enough to provide some seclusion, but not so large as to require undue expense for construction of driveways and improvements. (T.C. at 11). The Treanor tract is roughly bisected by a gravel, all-weather road (T.C. at 6), permitting a division into separate parcels of appropriate size, each having adequate road frontage and sufficient access to areas topographically and economically suited for the construction of retreat-type dwellings. (T.C. at 11). The ready access to Interstate 40, U.S. Route 70, and Tennessee Route 100 places the property within easy reach of the Nashville Metropolitan area, which is located twenty-five miles west of the Treanor tract, and affords the possibility of convenient holiday and weekend use. (T.C. at 6).

In recognition of this highest and best use of the property, the Petitioners retained an engineering firm to prepare a plat dividing the Treanor tract into suitable retreat parcels. This plat established the feasibility of dividing the Treanor tract into twenty-four individual parcels ranging in size from 13 to 137 acres, each having access to the road. (T.C. at 11).

On June 1, 1977, Petitioners granted a scenic easement over 1342.66 acres, comprised of both the Treanor tract and the adjoining thirty-one Ranchettes, to the Tennessee Conservation League, a qualified public charity. (T.C. at 2, 6). The easement precluded the subdivision of the tract into secluded recreational

retreats by limiting residential use to one family dwelling unit for each two hundred acres of land restricting excavation or topographic change, and prohibiting injury to flora and fauna. (T.C. at 2, 3, 11).

The Petitioners filed joint Federal income tax returns for calendar years 1977, 1978 and 1979 with the Memphis Service Center, in which they deducted the fair market value of the charitable donation of the scenic easement to the Tennessee Conservation League. (T.C. at 11). Since the deduction was limited to $110,648 in 1977, the remainder was carried over to tax years 1978 ($103,240) and 1979 ($68,536) (T.C. at 11).

On April 13, 1981, the Commissioner of Internal Revenue ("Commissioner"), by Statutory Notice of Deficiency, disallowed the charitable deductions claimed by Petitioners, explaining that the Petitioners failed to establish the fair market value of the restrictive easement. (T.C. at 11).

Petitioners made timely petition to the United States Tax Court. Both parties and the Tax Court agreed that the value of a scenic easement is determined by measuring the difference between the fair market value of the property immediately before the granting of easement and the fair market value of the property immediately after the scenic easement was granted. (799 F.2d at 245). The parties further agreed on the post-easement value of the Treanor tract, on the value of improvements on the tract, and on the post-easement value of the thirty-one Ranchettes. (799 F.2d at 245).

Therefore, the dispute in the Tax Court focused on the pre-easement value of the Treanor tract and the

thirty-one Ranchettes. (799 F.2d at 245). Relying upon 26 C.F.R. §1.170A-1(c)(1) & (2), as well as *Estate of Rabe, Inc. v. Commissioner*, T.C. Memo 1975-26, 34 T.C.M. 117, CCH Dec. 33,039 (1975), *Anselmo v. Commissioner*, 80 T.C. 872 (1983), *aff'd*, 757 F.2d 1208 (11th Cir. 1985), and *Goldman v. Commissioner*, 388 F.2d 476 (6th Cir. 1967), Petitioners argued that since the undisputed highest and best use of the Treanor tract prior to granting the scenic easement was its subdivision into twenty-four separate parcels, the valuation criterion to be applied must assess the individual values of the subdivided lots which comprise the entire tract, rather than the price at which the 1260 acre Treanor tract would change hands in a single sale. In rejecting Petitioner's argument, the Tax Court adopted an appraisal of the pre-easement value of the property which reflected the price that a "hypothetical Malcolm Forbes," 799 F.2d at 245, would have paid for the entire Treanor tract in a single purchase.[2] (T.C. at 19). However, the Tax Court

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[2] The Tax Court adopted the appraisal of Commissioner's expert, Dennis H. Donovan. (T.C. at 19). In assessing the value of the Treanor tract, Donovan utilized only two comparable sales, one of approximately 1,000 acres, and the other of 1,400 acres. (T.C. at 19). Donovan refused to consider comparable sales of smaller parcels, even though he found the highest and best use "to be in tracts of 50-200 acres for use as vacation retreats" (T.C. at 19), because he believed that as a matter of law he was bound to value the Treanor tract using comparables which were equivalent in size to the total property. At trial, Mr. Donovan stated that, as a matter of law, if "[you] [t]ook part A, part B and part C and added them together, that was an improper approach." (Transcript, p. 168). Petitioner's expert, on the other hand, utilized comparable sales ranging in size from 5 to 132 acres, representing the sale of the individual parcels in the subdivided Treanor tract. (T.C. at 17).

determined the pre-easement value of the thirty-one Ranchettes by summing the individual values of the subdivided lots. (T.C. at 19-20).

Petitioners appealed the Tax Court decision to the Court of Appeals for the Sixth Circuit.[3] In a *per curiam* opinion, the Sixth Circuit affirmed the Tax Court. *Akers v. Commissioner*, 799 F.2d 243 (6th Cir. 1986), set forth in Appendix hereto at 23-30. The Sixth Circuit found:

> It is indisputable that the Treanor Tract was a single property immediately prior to the grant of the easement, and the regulatory definition does suggest that the appropriate question is what a hypothetical Malcolm Forbes would have paid for it as one tract, rather than what two dozen hypothetical yuppies would have paid for it as 24 "Ranchettes."

799 F.2d at 245.

The Sixth Circuit opinion examines whether the Treanor tract was actually subdivided and platted on the date when the scenic easement was granted. Rather than focusing on the highest and best use of the property, the Sixth Circuit focused on the then-existing legal boundaries of the property, and held that since the Treanor tract was a single, undivided property prior to the granting of the easement, "the market most appropriately used in estimating the value of the Treanor Tract is the market for large

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[3] Petitioners accepted the Tax Court determination of the pre-easement value of the 31 Ranchettes. Therefore, Petitioners' appeal related solely to the Treanor tract.

tracts of over 1,000 acres, and not the market for properties averaging less than a tenth that size." 799 F.2d at 246.

Because an admittedly unresolved and important question of federal tax law is presented in this case, Petitioners seek review of the Sixth Circuit decision and judgment on the application of 26 C.F.R. §1.170A-1(c)(1) & (2) to the valuation of a large tract of real property which is whose highest and best use is admittedly subdivision and sale in smaller parcels.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

This case is ripe for Supreme Court review to resolve an important question of federal tax law regarding the criterion to be applied to the valuation of a large tract of real property whose highest and best use requires subdivision and sale in smaller parcels. The decision of the Sixth Circuit is in conflict with the valuation criterion established in a series of decisions by the United States Tax Court in two material respects. First, 26 C.F.R. §1.170A-1(c)(1) and (2) require that when the highest and best use of real estate is its subdivision and sale in smaller parcels, the valuation must assess the individual values of subdivided lots which comprise the entire tract. Second, 26 C.F.R. §1.170A-1(c)(1) and (2) require the valuation of real estate in the retail market—the sale to an ultimate consumer who does not hold the item for subsequent sale. Therefore, since the Sixth Circuit opinion has recast the proper interpretation of fair market value under 26 C.F.R. §1.170A-1(c)(1) and (2) as it applies to real estate, this Court should grant

a writ of certiorari to resolve this important issue of federal tax law.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE VALUATION CRITERION ESTABLISHED BY 26 C.F.R. §1.170A-1(c)(1) and (2) AND ITS SUBSEQUENT CASE LAW.

A. Introduction.

26 C.F.R. §1.170A-1(c)(1) provides that if "a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of contribution. . ." 26 C.F.R. §1.170A-1(c)(2) defines "fair market value" as "the price at which the property would change hands between a willing buyer and a willing seller, . . . both having reasonable knowledge of relevant facts."

It is axiomatic that the fair market value of real property must reflect "the highest and best use of the property on the relevant valuation date. Any realistically available special use of property due to its adaptability to a particular business is an element that *must be considered* in determining the fair market value thereof." *The Stanley Works v. Commissioner*, 87 T.C. No. 22, CCH Dec. 43,274 at 3448 (Aug. 12, 1986), *citing Mitchell v. United States*, 267 U.S. 341, 344-45 (1925) (emphasis added). *See also, Todd v. U.S.*, 617 F.Supp. 253, 85-2 USTC 89,237, 89,239 (W.D. Pa. 1985) (stating that the "amount of charitable deduction plaintiffs may take for the grant of the scenic easement is the *difference* between the fair market value of the property, *based on its 'highest and best use,' before* and *after* the grant of the easement") (some emphasis added).

Further, the United States Tax Court has consistently held that real estate appraisals which fail to properly consider the highest and best use of the subject property should be disregarded. *See, e.g., Symington v. Commissioner*, 87 T.C. No. 59 CCH Dec. 43,467 at 3681 n. 8 (October 29, 1986); *Stanton v. Commissioner*, T.C. Memo. 1980-300, 40 T.C.M. 885, 888, CCH Dec. 37,135 (1980); *Thayer v. Commissioner*, T.C. Memo 1977-370, 36 T.C.M. 1504, 1509, CCH Dec. 34,708 (1977).

In the instant case, both parties, the Tax Court, and the Sixth Circuit agree that the highest and best use of the Treanor tract was "for secluded recreational retreats." (T.C. at 11). It is further undisputed that "(i)t would have been feasible before the granting of the easement to have divided the Treanor tract into 24 separate tracts ranging in size from 13 to 137 acres, each having some access to a road." (T.C. at 11). In fact, the Petitioners retained an engineering firm which prepared a plat dividing the Treanor tract into twenty- four suitable retreat parcels. (T.C. at 11). Nonetheless, the Tax Court adopted, and the Sixth Circuit affirmed, the appraisal of Commissioner's expert, Dennis H. Donovan. (T.C. at 19). In assessing the value of the Treanor tract, Donovan utilized only two comparable sales, one of approximately 1,000 acres, and the other of 1,400 acres. (T.C. at 19). Donovan refused to consider comparable sales of smaller parcels, even though he found the highest and best use "to be in tracts of 50-200 acres for use as vacation retreats" (T.C. at 19), because he believed that *as a matter of law* he was bound to value the Treanor tract using comparables which were equivalent in size to the total property. At trial, Mr. Don-

ovan stated his belief that, as a matter of law, if "(you) (t)ook part A, part B and part C and added them together, that was an improper approach." (Transcript, p. 168).

Apparently, the Sixth Circuit agreed with Mr. Donovan's legal interpretation of what was and was not an "improper approach." The rationale of the Sixth Circuit is summarized in the opening paragraph of its analysis:

> It would not be appropriate to place undue emphasis on semantics, but we note in passing that the regulatory definition of fair market value speaks of "the" price at which "the" property would change hands between "a" willing buyer and a willing seller. It is indisputable that the Treanor Tract was a single property immediately prior to the grant of the easement, and the regulatory definition does suggest that the appropriate question is what a hypothetical Malcolm Forbes would have paid for it as one tract, rather than what two dozen hypothetical yuppies would have paid for it as 24 "Ranchettes."

799 F.2d at 245.

The factor upon which the Sixth Circuit opinion turns is whether the Treanor tract was actually subdivided and platted on the date when the scenic easement was granted. Rather than focusing on the highest and best use of the property, the Sixth Circuit focused on the then-existing legal boundaries of the property, and held that since the Treanor tract was a single, undivided property prior to the granting of the easement, "the market most appropriately used

in estimating the value of the Treanor tract is the market for large tracts of over 1,000 acres, and not the market for properties averaging less than a tenth that size." 799 F.2d at 246.

The Sixth Circuit analysis misinterprets 26 C.F.R. §1.170A-1(c)(1) and (2), and directly conflicts with subsequent case law in two respects. First, it confuses the real estate valuation concept of "highest and best use" with the legal concept of defined boundaries of real property. Second, it values the Treanor tract in the wholesale market, i.e., the bulk sale of real property which can later be subdivided and sold in smaller parcels to ultimate consumers, even though 26 C.F.R. §1.170A-1(c)(1) and (2) and subsequent case law require valuation with reference to the retail market.

B. Highest and Best Use v. Legal Boundaries

The Sixth Circuit opinion directly conflicts with the valuation criterion established by 26 C.F.R. §1.170A-1(c)(1) and (2) and its subsequent case law. This regulation and the case law require that when the highest and best use of real property is its subdivision and sale in smaller parcels, the valuation must assess the individual values of the subdivided lots which comprise the entire tract.

The Tax Court expressly so held in *Symington v. Commissioner*, 87 T.C. No. 59 CCH Dec. 43,467 (October 29, 1986), which presents a fact situation nearly identical to the instant case. In *Symington*, the Petitioners granted an open-space easement in gross over a 61.3 acre tract known as Friendship Farm. The restrictive easement expressly prohibited subdivision of the property in any manner.

The parties agreed that the value of an open-space easement is determined by measuring the difference between the fair market value of the property before and after the granting of the easement. The parties further agreed on the post-easement value of Friendship Farms, and on the value of the improvements on the tract. Therefore, like the instant case, the dispute focused on the pre-easement value of the 61.3 acre tract.

The highest and best us of Friendship Farm was its subdivision into ten individual homesites with an average size of six acres. In recognition of this highest and best use, Petitioners submitted into evidence a hypothetical record plat which depicted a subdivision into ten individual homesites. This plat, like that in the present case, was prepared expressly for valuation purposes.

Three appraisals were presented at trial. The Tax Court summarily disregarded one appraisal because it "failed to consider subdivision as a probable use." *Id.* at 3681 n. 8.

The Tax Court adopted a valuation based on the assumption that a developer would purchase the land and subdivide it into individual homesites. The appraisal commenced by determining "the value of the land on the retail market, i.e., the per-acre price that a willing buyer, *desiring a small homestead tract. . .*, would have paid a developer for *an already subdivided piece* of land." *Id.* at 3681. The values of the individual subdivided lots were then aggregated, and adjusted to account for various selling expenses and holding costs. In supporting this valuation method, the Tax Court stated:

> We think he used good judgment in choosing his comparable sales (he focused on sales of smaller tracts approximate in size to the proposed homesite lots found on the record plat) . . . Moreover, [he] . . . performed his appraisal with a constant eye towards what was properly the basic underlying assumption of such a study— the potential subdivision of Friendship Farm.

Id. at 3682.

The court continued:

> We recognize that many large acreage sales were also discussed at trial and several were acknowledged by the experts to be fairly 'comparable' to the subject property. However, these sales would only have significance as comparables if we were engaging in an analysis of the value of Friendship Farm as a country Estate, and in fact were only evaluated in the expert reports with respect to that type of analysis. Therefore, while we have utilized this testimony in categorizing the types of adjustments to be considered in arriving at the estimated value of the subject property under the comparable sales approach we have not otherwise viewed them as persuasive indications of the value of Friendship Farm as a subdivided property.

Id. at 3682 n. 13.

The facts in *Symington* are nearly on all fours with the instant case. Yet, the legal determination of the proper valuation criterion to be applied is in direct conflict with the opinion of the Sixth Circuit.

Broad v. Commissioner, T.C. Memo. 1986-340, 52 T.C.M. 12, CCH Dec. 43,236 (Aug. 4, 1986) presents an analogous situation, and also directly conflicts with the Sixth Circuit opinion. In *Broad*, Petitioners purchased 186 grave sites in a memorial park near Philadelphia. After holding the sites for a period of at least twelve months, Petitioners donated the grave sites to a qualified charity. The court held:

> Since the grave sites could be sold on other than a bulk basis, the fair market value of the donated grave sites would be the *sum of the values of the individual grave sites* and the value of each site would be the price at which it would change hands between a seller and *the ultimate consumer*, an individual buying his own or a family grave site.

Id. at 14. (emphasis added).

Two other cases likewise address the valuation of real estate with subdivision potential. In *Estate of Rabe v. Commissioner*, T.C. Memo 1975-26, 34 T.C.M. 117, CCH Dec. 33,039 (1975), the Tax Court adopted and wholeheartedly supported the analysis of the Commissioner's expert witness who "double checked his conclusions through a computation based on a subdivision analysis of the property." 34 T.C.M. at 119.

In *Thayer v. Commissioner*, T.C. Memo 1977-370, 36 T.C.M. 1504, CCH Dec. 34,708 (1977), the Tax Court specifically based its valuation on the number of homestead properties into which a 59.3 acre tract could be subdivided prior to the granting of a scenic easement to a qualified charity.

These cases consistently hold that when the highest and best use of property is its subdivision and sale

in smaller parcels, 26 C.F.R. §1.170A-1(c)(1) and (2) require the tract to be valued as the sum of the individual values of the subdivided lots. The Sixth Circuit, in viewing the Treanor tract as a single property to be purchased by some "hypothetical Malcolm Forbes," 799 F.2d at 245, essentially redefines the real estate concept of "highest and best use." The property in *Symington* was not subdivided prior to the granting of a scenic easement. Nor was the property in *Thayer*. They were each one single property.

Highest and best use has been defined as:

> A reasonable and probable use that supports the highest present value as defined as of the effective date of appraisal.
>
> Alternatively, that use from among reasonably probably and legal alternative uses found to be physically possible, appropriately supported financially feasible and which results in highest land value.

Todd v. U.S., 617 F.Supp. 253, 85-2 USTC 89,237, 89,239 (W.D. Pa. 1985). Further, the "fair market value of property is not affected by whether the owner actually has put the property to its highest and best use. The realistic, objective potential uses for property control the valuation thereof." *The Stanley Works v. Commissioner*, 87 T.C. No. 22, CCH Dec. 43,274 (Aug. 12, 1986). Consequently, "highest and best use" contemplates potential use. It does not require the magic legal step of recording a subdivision plat.

Nonetheless, the Sixth Circuit focuses on the then-existing legal boundaries of the Treanor tract, and completely disregards the undisputed highest and best use of the property. The issue is not what a "hy-

pothetical Malcolm Forbes," 799 F.2d 245, would pay for the tract in a single purchase. Subdivision contemplates the purchase of smaller, individual parcels.

The "Malcolm Forbes" approach is wrong as a matter of law, and directly conflicts with the decisions previously discussed. As the *Symington* Court stated:

> We recognize that many large acreage sales were also discussed at trial and several were acknowledged by the experts to be fairly 'comparable' to the subject property. However, these sales would only have significance as comparables if we were engaging in an analysis of the value of Friendship Farm as a country Estate . . . . [W]e have not otherwise viewed them as persuasive indications of the value of Friendship Farm as a subdivided property.

87 T.C. No. 59 at n. 13.

When the testimony of Commissioner's expert is examined, the Sixth Circuit's misapplication of 26 C.F.R. §1.170A-1(c)(1) and (2) is undeniable. Donovan focused on the legal boundaries of the property being appraised. To him, highest and best use was merely a secondary consideration, as he unequivocally understood that, *as a matter of law*, he was constrained to use comparable sales of equivalent size to the legal boundaries of the tract being valued. On cross-examination, the following exchange occurred:

> Q. And in deriving comparables, you didn't use any 50 to 200 acre tracts, did you?
>
> A. Correct, emphatically correct. Let me put it to you this way. Anytime you use a

> 100 acre tract to appraise a 1,000 acre tract, you better use it very carefully because you are comparing apples and oranges.
>
> ****
>
> The question is, what would this total property [bring] selling in the open market with this potential to a single buyer? (Transcript, p. 153)

Later, when pressed by the court to justify his approach assuming a single large tract sale despite the fact that the highest and best use would lead to multiple sales of 50 to 200 acre parcels, Mr. Donovan admitted that his conclusions were based, not on appraisal principles, but on his own view of the law:

> And I guess I will give you some of my background to how--you know, why I think this way. That work with TVA we have testified many times in eminent domain cases, and a lot of the times it involves either subdivision or timberland in [sic].
>
> *I am not a lawyer, so I am not going to try to quote law, but it was impressed upon me by both the lawyers*—in fact I seen them through [sic] out of court *when they came in and testified a summation, that approach to value. Took part A, part B and part C and added them together, that was an improper approach.* (emphasis added). (Transcript, p. 168)

Mr. Donovan believed that, *as a matter of law*, he was bound to value the Treanor tract using comparables which were equivalent in size to the total prop-

erty without regard to the fact that its highest and best use dictated sales of smaller parcels.

Interestingly, in valuing the thirty-one Ranchettes which were already platted as a subdivision, and which were contiguous with the Treanor tract and each other, Mr. Donovan used, as comparables, sales of 1 to 7 small, subdivided lots. Based on his approach to the Treanor property he should presumably have sought sales of approximately 30 contiguous subdivision lots *en masse* for comparison. He explained this apparent inconsistency:

> THE COURT: Why would you divide it to that extent since the ranchettes came pretty well right up on the same property?
>
> THE WITNESS: I think I explained that *to me it is more of a legal problem* because the lots are platted, individual lots that are being taxed individually—(Transcript, p. 171) (emphasis added)

This interpretation is blatently wrong. Consequently, the Sixth Circuit affirmance of the Tax Court decision directly conflicts with the valuation criterion established by 26 C.F.R. §1.170A-1(c)(1) and (2) and its subsequent case law. This regulation and the case law require that when the highest and best use of real property is subdivision and sale in smaller parcels, the valuation must assess the individual values of the subdivided lots which comprise the entire tract.

C. Retail Value v. Wholesale Value.

In affirming the valuation of the Treanor tract as a "single property" even though its highest and best use was subdivision into twenty-four smaller parcels, the Sixth Circuit has valued the Treanor tract in the

wholesale market, i.e., the bulk sale of real property which can later be subdivided and sold in smaller parcels to ultimate consumers. Notwithstanding the highest and best use of the property, the Sixth Circuit held that since the Treanor tract was a single, undivided property prior to the granting of the easement, "the market most appropriately used in estimating the value of the Treanor tract is the market for large tracts of over 1,000 acres, not the market for properties averaging less than a tenth that size." 799 F.2d at 246.

This holding by the Sixth Circuit violates both the Commissioner's regulations and case law which mandate valuing property on the basis of individual units which correspond in type and size to the most common market for the property being valued. For example, the Commissioner's Regulations at 26 C.F.R. §20.2031-1(b) state:

> The value is generally to be determined by ascertaining as a basis the fair market value as of the applicable valuation date of *each unit of property*. (emphasis added).

The Tax Court has applied that regulation and the similar regulation at §25.2512-1 to the question of valuing property for purposes of the charitable contribution deduction under the income tax statutes, precisely the issue presented in here. In *Anselmo v. Commissioner*, 80 T.C. 872 (1983) *aff'd*, 757 F.2d 1208 (11th Cir. 1985), the court stated:

> We believe the best guide to use in determining whether to look to bulk or individual sales for valuation purposes is Section 20.2031-1(b), Estate Tax Regs., and Section

> 25.2512-1, Gift Tax Regs. These regulations indicate that a separate fair market value should be determined for each *unit* of property. . . . Thus, the valuations made by respondent's experts are unacceptable because they were based on the erroneous assumption that the gems had to be valued on a bulk scale [sic] basis.

80 T.C. at 879 (emphasis in original).

The *Anselmo* case dealt with whether or not poor quality gem stones should be valued individually or in bulk. The court held that they should be valued individually because:

> The record in this case shows that individual stones are frequently sold by memorandum houses and sometimes by wholesalers to jewelry stores and other purchasers, which undermines respondent's contention that the stones could only be sold on a bulk basis.

Id.

Thus, in determining whether property should be valued in bulk or in smaller units, the proper approach is to first determine the most common market for property of the nature and type being valued. This rule was stated by the Sixth Circuit in *Goldman v. Commissioner*, 388 F.2d 476 (6th Cir. 1967):

> We hold that where a deductible charitable contribution is made in property other than money, the allowable deduction is the fair market value computed on the price an ultimate consumer would pay, and that what

> might be paid by a dealer buying to resell is not a proper consideration.

Id. at 478. *See also, Biagiotti v. Commissioner*, T.C. Memo. 1986-460, 52 T.C.M. 588, 593 CCH Dec. 43,375 (Sept. 22, 1986) (stating that the "sale to the ultimate consumer is any sale to those persons who do not hold the item for subsequent resale").

Notwithstanding this, the Sixth Circuit affirmed the Tax Court's adoption of the appraisal valuation prepared by Mr. Donovan, the Commissioner's expert. Under examination by Judge Scott, Mr. Donovan testified that he valued the Treanor tract as though it were sold to a buyer who would subdivide and resell it.

> The Court:. . . But the 1,261 [acres of the Treanor property] you viewed as if he put the full thing up for sale? Explaining to anyone that wanted to buy it, well, look you divide this into lots of 50 to 200 acres and make yourself a lot of money and so forth.
>
> The Witness: Right. Yes Your Honor. (Tr. 171-2)

If the large acreage sales used by Mr. Donovan are comparable to the Treanor tract, they clearly represent the wholesale market.

The Sixth Circuit's reasoning in affirming a wholesale valuation of the Treanor tract is tenuous at best. In contrasting the present case to *Anselmo*, *supra*, 757 F.2d at 1208, and *Goldman*, 388 F.2d at 476, *supra*, the Sixth Circuit stated:

> The affirmance of the Tax Court's decision in *Goldman* does not require a reversal of the Tax Court's decision here. The books that were given away in *Goldman* had already been "subdivided," in effect. Unlike the unmounted gems in *Anselmo*, and unlike the undivided Treanor Tract, the medical books were ready for immediate sale in the retail market. . . .

799 F.2d at 247.

The Sixth Circuit is essentially stating that if the Treanor tract had been legally platted as a subdivision prior to the granting of the easement, then the tract should have been valued as the aggregate sum of the individual values of the subdivided lots.

This is but another instance of the court's confusion of the real estate concept of highest and best use with the legal concept of defined boundaries of real property. The costs of preparing and recording a subdivision plat are selling expenses. They do not, and can not, affect the highest and best *use* of real property. *See Symington v. Commissioner*, 87 T.C. No. 59 at 3680 n. 6 and accompanying text.

Consequently, the Sixth Circuit affirmed the wholesale valuation of the Treanor property. This is not the proper legal standard of fair market value as 26 C.F.R. §1.170A-1(c)(1) and (2) and subsequent case law require valuation in the retail market—the sale to an ultimate consumer who does not hold the item for resale. The significance of this error is all the more important because the effect of a charitable conservation easement granted by taxpayers is principally to reduce the marketability of the property. By

limiting the consideration of pre-easement value to wholesale value, the court significantly understated the true loss in value to the property as a result of the easement's grant.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 18, 1986.

Respectfully submitted:

MARK H. WESTLAKE
Counsel for Petitioners
TUNE, ENTREKIN & WHITE

APPENDIX

APPENDIX A

T. C. Memo. 1984-490
UNITED STATES TAX COURT

Docket No. 14435-81.

Filed September 12, 1984.

WILLIAM B. AKERS and JOANN AKERS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Mark H. Westlake and *Ervin M. Entrekin*, for the petitioners.

Robert B. Nadler and *John L. Hopkins*, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SCOTT, *Judge*: Respondent determined deficiencies in petitioners' income taxes in the amounts of $79,755.22, $62,088.90, and $46,863.58 for the years 1977, 1978, and 1979, respectively. Some of the issues raised by the pleadings have been disposed of by agreement of the parties, leaving for our decision only the fair market value on June 1, 1977, of a scenic easement that petitioners donated over 1,342.66 acres of land in Cheatham County, Tennessee, to the Tennessee Conservation League.[1] The parties agree

[1] The issue is relevant to taxable years 1978 and 1979 because of claimed carryovers of a charitable contribution deduction from the year 1977.

that to the extent this easement had a fair market value, its grant entitles petitioners to a charitable deduction under section 170(a)(1).[2]

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly.

William B. Akers and JoAnn D. Akers (petitioners), husband and wife, who resided in Nashville, Tennessee, at the time of the filing of their petition in this case, filed joint Federal income tax returns for the calendar years 1977, 1978, and 1979 with the director, Memphis Service Center, Memphis, Tennessee. For the calendar year 1977, petitioners filed and amended return.

On June 1, 1977, petitioners granted a scenic easement over 1,342.66 acres of land located in Cheatham County, Tennessee, to the Tennessee Conservation League (TCL) which qualifies as a public charity.[3] The easement was granted for the scenic enjoyment of the public as well as the conservation and protection of the natural environmental systems on the property. The easement, which is for a period of 30 years and approximately 1 month, will terminate on June 30, 2007. At that time the property will revert unencumbered to petitioners.

The following convenants and restrictions are contained in the instrument conveying the easement:

1. There shall be no more than one family dwelling unit for each two hundred (200) acres of land.

2. No structures of any kind shall be placed or erected except such structures as shall be approved by the Ten-

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[2] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended and in effect during the years here in issue.

[3] Pursuant to sec. 170(b)(1)(A), the TCL qualifies as a public charity.

nessee Conservation League as being consistent with the purpose of establishing an easement for the scenic enjoyment of the public and as being consistent with the protection of and preservation of the natural environmental systems within the property described in Exhibit "A".

3. There shall be no dumping of ashes, trash, junk, rubbish, sawdust, garbage or any other unsightly, unsanitary or offensive material on or within the said property.

4. There shall be no structural changes or additions to any existing structures on said property as of the date of this conveyance unless and until an application therefor has been submitted to the Tennessee Conservation League and written approval has been obtained from the Tennessee Conservation League which written approval may be evidenced by a written instrument executed by its duly authorized executive director.

5. There shall be no private drives constructed upon said property after the date of this conveyance until and unless written application therefor has been made to the Tennessee Conservation League and written approval obtained from the said Tennessee Conservation League as evidenced by written instrument executed by its duly authorized executive director.

6. All plantings upon the property shall be approved by the Tennessee Conservation League as evidenced by a written instrument executed by its duly authorized executive director and all plantings shall be for the purpose of preserving the natural environmental system within the property. It is understood and agreed that Grantor reserves the right to plant flowers, vegetables, berries, fruit trees and farm crops characteristic of the region and those that might be suitable for experimental purposes in order to determine the plant life that might be accommodated by the natural environmental system of the property, provided that such plantings do not substantially alter the natural environmental systems.

7. There shall be no excavation or topographic changes that would cause or tend to create a material change in the general topography of the landscape which shall be maintained unless and until written approval has been obtained from the Tennessee Conservation League through its duly authorized executive director requesting or consenting to any such change.

8. No trees, shrubs, flowers or undergrowth shall be removed, cut, or destroyed except for reasons of sanitation and disease control and except such cutting or removal as shall be done in accordance with a plan consistent with the preservation of the environmental system of the property and heretofore filed with the Tennessee Conservation League and approved by its duly authorized executive director.

9. There shall be no use of the property if such use, in the opinion of the Tennessee Conservation League or its duly authorized executive director, will or does materially alter the landscape or other natural attractive features of said property, other than those as provided for herein which shall be done only with the written consent of the Tennessee Conservation League through its duly authorized executive director.

10. There shall be reserved unto the owner, his heirs, representatives and assigns, the right to maintain all of the buildings now existing and if any or all of them shall be destroyed or damaged by fire, storm or other casualty to restore same in conformity with the plans to be submitted to and approved by the Tennessee Conservation League, acting through its duly authorized executive director. Nothing in this instrument shall be construed to affect the rights of the owner, his heirs, representatives and assigns to construct wells, cisterns, cellars and septic systems necessary to the maintenance of the structures as may hereafter be approved for upon the property by the

Tennessee conservation League, acting through its duly authorized executive director.

11. The Tennessee Conservation League, acting by and through its executive director joins in the execution of this instrument for the purpose of acknowledging that it shall hold the above described easements exclusively for conservation purposes and that the Tennessee conservation League will actively carry out the Conservation purposes of protecting and preserving the property described herein for the people of Tennessee.

Provided, however, there shall be no grant of right of entry to the public whether limited or general and only those persons may enter the property as have the permission of the owner, his heirs, representatives and assigns. This instrument grants permission for entry upon the property for the executive director of the Tennessee Conservation League and his agents and employees for the purpose of enforcement of the restrictive covenants and easements granted by this instrument.

12. The Tennessee Conservation League shall enforce these restrictions acting through its executive director. Any failure to enforce these restrictions because of any violation shall not be deemed a waiver of such right as to any subsequent or other violations, such right being a continuing one.

13. Whenever this instrument calls for approval by the Tennessee Conservation League, it is understood and agreed that such approval is to be given by the executive director of the Tennessee conservation League or the equivalent person serving in such capacity for the Tennessee Conservation League or such successors or assigns which likewise qualify as public charities within the meaning of Section 170(b)(1)(A) of the Internal Revenue Code of 1954, as amended.

The scenic easement was conveyed over petitioners' property which consists of (1) 1,261.15 acres in a tract referred to as the Treanor Tract, which is located in the southwest corner of Cheatham County, Tennessee; and (2) 31 tracts which adjoin the Treanor Tract and total approximately 81.51 acres in a development known as the Interstate West Ranchettes Subdivision (Ranchettes). There is no commerical development in the area of the property. Cheatham County offers recreational activities such as hunting, boating, fishing and swimming. Petitioners' property in the Treanor Tract and the Ranchettes has no access to a public water supply or public sewerage.

Petitioners' property is approximately 25 miles east of Nashville, Tennessee, and is located 4 to 5 miles from I-40, which is the nearest interstate highway. The Treanor Tract is wooded except for approximately 140 acres of land that is suitable for farming. Generally the property consists of heavily wooded ridges and hollows with some creek bottom farmland. No marketable timber exists on the tract. Marketable timber in this area requires approximately 30 to 45 years between cuttings and the timber on petitioner's property was cut shortly before petitioners purchased it in 1965. The road throughout the Treanor Tract is an unpaved road that is not county maintained. The Treanor Tract is improved by two vacation homes. One is used by petitioners and the other is used by Mr. Aker's brother, J. Clark Akers, III. Each vacation home is adjacent to a dam and a lake.

The Subdivision of the Ranchettes into 600 lots began in 1963 and by 1977 all but 6 lots had been sold. In 1977, only 30 to 40 of the 600 lots that had been sold had houses built of them. Petitioners' lots in this development are wooded and are generally level or gently sloping to the rear and all lots face county maintained roads.

The 31 tracts which petitioners own in the Ranchettes range in size from 2 acres to 5.90 acres. The average size of these tracts is 2.63 acres.

Petitioners purchased the 1,261.15 acres of the Treanor Tract in 1965 for $125,000. From 1970 through early 1977, petitioners acquired from various grantor the 31 separate tracts in the Ranchettes. The following table shows the acquisitions by petitioners of lots in the Ranchettes from 1970 through 1976:

Lots	Date of Contract	Date Consideration Passed	Cost
51, 146	2/20/70	2/25/70	$1,990
45, 46, 47	5/24/72	5/24/72	$4,500
147	9/29/72	9/29/72	1,500
150, 151, 152, 161	8/72	10/2/72	5,000
148	12/5/72	12//5/72	1,500
268, 269, 270, 271, 272	8/10/72	8/10/72	7,000
299	8/72	10/2/73	1,500
149	7/74	12/9/74	2,500
162	5/74	12/9/74	1,500
313	1/21/75	1/21/75	1,500
54	4/10/75	9/5/75	2,750
153	10/29/73	9/5/75	1,700
48	8/9/76	11/22/76	2,500
56	10/19/76	11/22/76	3,000
42, 43	5/20/76	3/8/77	4,500
52, 53	3/12/76	11/22/76	9,000

The following table shows petitioner's acquisitions in the Ranchettes in 1977, the acreage of each lot and the cost per acre:

Lots	Date of Contract	Date Consideration Passed	Acreage	Cost	Cost Per Acre
137	1/13/77	1/13/77	5.9	$2,000	$338.98
138	1/14/77	3/8/77	3.5	1,800	514.29
55	3/8/77	3/8/77	2.67	1,333	499.25

Both petitioners and J. Clark Akers, III, have an A-frame vacation home on the Treanor Tract. Petitioner's vacation home overlooks a $1^1/_2$ acre lake. Two acres of grass surround the house. The access to the house is by means of a short graveled driveway which is approximately 300 feet from the main road. There is a boat dock on the shore of the lake.

Petitioners' house was built in 1969 and contains 1,434 square feet on the main floor and 270 square feet in the loft. There are two bedrooms with adjoining ceramic title baths, a kitchen-living room with a 10-foot stone fireplace and a cathedral wood beam ceiling. The kitchen has a built-in oven, electric range, dishwasher and numerous kitchen cabinets of top quality wood. The bedrooms and living room have parquet floors, while the kitchen has vinyl inlaid linoleum. The entire house has wood paneling. There is a metal spiral stairway to the loft which contains two built-in beds. There are four screened wooden floor porches across the north and south sides of the dwelling as well as a usable basement with concrete floor and an oil furnace. The house has central heat but no air-conditioning. The exterior of the house has rustic wood frame sides and a metal roof. When petitioners' A-frame dwelling was built, a dam impounding the adjoining lake was built with approximately 60 yards of reinforced concrete.

J. Clark Akers, III, built his A-frame dwelling in a separate portion of the subject property in 1973. His house

contains approximately 1,092 square feet [4] on the main floor and 168 square feet in the loft. His private lake is about 4 acres and a 1-acre grass area surrounds the house. The access to the house is by means of a long graveled driveway approximately 2,500 feet off the main road. The house has two bedrooms with adjoining baths, a kitchen-living room and a loft. The living room has a wood beamed cathedral ceiling and a metal freestanding fireplace. There is no basement, but a storage room is accessible from the outside. There is a modern kitchen, central oil heating and central electric air-conditioning. The floors are carpeted in the bedrooms, vinyl is in the kitchen, hardwood is in the living room and ceramic tile is in the baths. The exterior of the house is rustic wood frame with metal and composition siding shingle. Both houses have well with electric pumps and septic tanks.

The subject property, including the Treanor Tract, the Ranchettes and the vacation homes, was appraised for real estate tax purposes by the Cheatham County Tax Office in 1969 and 1979 in accordance with the policy of the county to appraise real property every 10 years. The value of the property in 1969 according to the Cheatham County Tax Office appraisal was $196,480. After 1973 this valuation was updated to include the vacation home of J. Clark Akers, III. The 1979 appraisal of the subject property by the Cheatham County Tax Office showed its value to be $497,535.

The following schedule lists certain sales of properties in Cheatham County, except as otherwise indicated, the size of each tract, the date of the sale, the total sales price and the price per acre:

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[4] In his real estate appraisal, Mr. Doubleday concluded that this dwelling contained 1,082 square feet.

Sale No.	Acres in Tract	Date of Sale	Total Sales Price	Sales Price Per Acre	
1	63	1/27/77	$ 42,000.00	$ 666.67	(Dickson County)
2	65.85	1/10/77	52,000.00	789.67	(Dickson County)
3	72	8/15/77	60,000.00	833.33	(Williamson County)
4	5	5/17/77	3,500.00	700.00	(Williamson County)
5	40.229	5/25/77	40,229.00	1,000.00	(Williamson County)
6	6.75	7/21/77	11,125.00	1,648.00	
7	13.85	10/8/77	18,000.00	1,299.46	
8	10.02	9/8/77	10,020.00	1,000.00	
9	15.14	10/26/76	12,750.00	842.14	
10	10.10	1/10/77	9,500.00	940.59	
11	9.5	5/31/77	12,500.00	1,315.79	
12	132	12/16/77	72,000.00	545.45	
13	9.22	8/16/77	5,000.00	542.29	
14	1,437.70	12/20/73	431,310.00	300.00	
15	1,006.77	2/20/79	650,000.00	646.00	
16	2,200	12/72	398,200.00	181.00	
17	243	4/75	40,095.00	165.00	
18	109	12/77	34,989.00	321.00	
19	165	8/75	17,490.00	106.00	
20	117	6/75	14,976.00	128.00	
21	148	9/76	34,928.00	236.00	
22	44	3/78	22,000.00	500.00	
23	64	8/76	30,912.00	473,00	
24	44.4	9/78	13,808.40	311.00	
25	91.25	2/78	30,021.25	329.00	
26	99.8	6/78	27,544.80	276.00	
27	134.48	3/79	80,688.00	600.00	(Williamson County)
29	178	7/76	89,000.00	500.00	

The current highest and best use of the subject property, both before and after the gift of the easement, was for secluded recreational retreats. It would have been feasible before the granting of the easement to have divided the Treanor Tract into 24 separate tracts ranging in size from 13 to 137 acres, with each tract having some access to a road.[5] After the gift of the easement, it would not have been feasible to sell the total subject property in more than six tracts for use as retreats because the restriction permitted the building of only six residences on the property.

The deduction taken by petitioners on their Federal tax return for 1977 as a result of the conveyance of the scenic easement to the TCL was limited to $110,648 with the remainder carried over to tax years 1978 and 1979. On their 1978 and 1979 Federal income tax returns, petitioners claimed charitable deductions in the amounts of $103,240 and $68,536, respectively, from carryovers relating to the scenic easement given in 1977 to the TCL.

Respondent, in his notice of deficiency, disallowed the $110,648, $103,240 and $68,536 charitable deductions claimed by petitioners on their Federal income tax returns for 1977, 1978 and 1979, respectively, explaining that the deductions were not allowable because petitioners failed to establish the fair market value of the restrictive easement granted to the TCL of Nashville, Tennessee.

OPINION

Section 1.170A-1(c)(1),[6] Income Tax Regs., provides that when a charitable contribution is made in property other

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[5] Petitioners introduced in evidence a map showing such a possible division of the Treanor Tract. This map showed one tract of 137 acres, one of 116 acres, two of 83 to 84 acres, two of 75 to 77 acres, three of 61 to 65 acres, two of 49 to 52 acres, six of 42 to 46 acres, four of 28 to 36 acres, two of 18 to 21 acres and one of 13 acres. The 13-acre tract was adjacent to petitioners' Ranchettes lots.

[6] Sec. 1.170A-1(c)(1), Income Tax Regs., provides:

than money, the amount of the contribution is the fair market value of the property at the date contributed reduced when necessary as provided in section 170(e)(1). The fair market value of property is defined in section 1.170A-1(c)(2), INcome Tax Regs., as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts."

According to section 170(f)(3)(A),[7] no deduction is allowed for a charitable contribution of less than the taxpayer's entire interest in property. An exception is provided in section 170(f)(3)(B)(iii) and (C) (iii),[8] in the case

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If a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution reduced as provided in section 170(e)(1) and paragraph (a) of § 1.170A-4, or section 170(e)(3) and paragraph (c) of sec. 1.170A-4A.

[7] Sec. 170(f)(3)(A) provides:

In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxypayer's entire interest in such property.

[8] Sec. 170(f)(3)(B)(iii) and (C) (iii) provided:

(B) Exceptions—Subparagraph (A) shall not apply to a contribution of—

* * *

(iii) a lease on, option to purchase, or easement with respect to real property granted in perpetuity to an organization described in subsec-

of the contribution of an easement with respect to real property granted to a qualified organization exclusively for the protection of natural environmental systems.[9]

Respondent takes the position that the pre-easement fair market value of petitioners' land was the same as the post-easement fair market value of petitioners' land. The easement, respondent asserts, did not diminish the value of the property because the easement imposed no restrictions on the highest and best use of petitioners' land as a pleasure retreat before and after the granting of the easement. Thus, respondent argues, the fair market value of the easement donated to the TCL by petitioners in 1977 was zero.

Petitioners take the position that the fair market value of the scenic easement was $789,000, which they contend is the difference between the pre-easement value of petitioners' land ($1,342,00) and the post-easement value of petitioners' land ($553,00). Thus, petitioners claim they are entitled to a charitable deduction in the amount of $789,00.

The fair market value of property at any given date is a factual question and requires a consideration and weighing of all the relevant evidence in the record. *Mauldin v.*

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tion (b)(1)(A) exclusively for conservation purposes, * * *

* * *

(C) Conservation purposes defined.—For purposes of subparagraph (B), the term "conservation purposes" means—

* * *

(iii) The protection of natural environmental systems.

[9] Sec. 2124(e) of PUb. L. 94-455, 90 Stat. 1520, 1917, 1976-3 C.B. (Vol. 2) 656, provides that a deduction is allowed for the contribution to a charitable organization exclusively for "conservation purposes" of an easement under sec. 170(f)(3) only if the contribution was made after June 13, 1976, and before June 14, 1977, and the easement was at least 30 years in duration.

Commissioner, 60 T.C. 749, 759 (1973); *Kaplan v. Commissioner*, 43 T.C. 663, 665 (1965).

Both parties agree that in valuing a scenic easement a "before and after approach" may be used.[10] This procedure entails measuring the difference between the fair market value of petitioners' property immediately before the scenic easement was granted and the fair market value of the property immediately after the scenic easement was granted.

Both parties presented expert testimony of real estate appraisers to support their valuations of the scenic easement as of June 1, 1977. All three experts prepared written reports of their appraisals.

Petitioners' expert witness, Benjamin B. Doubleday, Jr., of Nashville, Tennessee, is a real estate broker and owner of Doubleday & Co., a real estate firm located in Nashville, Tennessee.

Mr. Doubleday inspected and appraised the subject property from January 1, 1978, to March 31, 1978, in response to a request from petitioners' attorney to appraise the fair market value of the subject property as of June 1, 1977. Mr. Doubleday concluded in a formal written report that the easement reduced the fair market value of petitioners' property by the amount of $772,000. This figure approximates the difference between the amount Mr. Doubleday concluded was the pre-easement value for the subject property, $1,342,000 (rounded), and the post-easement value of the property, $585,700 (rounded).

One of respondent's expert witnesses, Paul Johnson, was licensed as a real estate broker by the State of Georgia

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[10] See *Thayer v. commissioner*, T.C. Memo. 1977-370; Rev. Rul. 73-339, 1973-2 C.B. 68, clarified by Rev. Rul. 76-376, 1976-2 C.B. 53.

in 1975. At the time of his appraisal of the subject property, he was employed by the Internal Revenue Service in Atlanta, Georgia, as a real estate appraiser.

Mr. Johnson inspected the subject property on June 25, 1981, and supported his appraisal with a formal written report dated July 31, 1981. Mr. Johnson concluded that the pre-easement value for the property, which he calculated to be $668,500, remained the same after petitioners' grant of the scenic easement to the TCL. He concluded that the reduction in fair market value of petitioners' property as a result of their conveyance of the scenic easement to the TCL was zero.

Respondent's second expert witness, Dennis H. Donovan, was a real estate appraiser for Norman Hall & Associates, a real estate appraisal and consulting firm located in Nashville, Tennessee. He had worked as a real estate appraiser for the Tennessee Valley Authority from 1963 to 1982.

Mr. Donovan inspected the subject property on June 16, 1983, and reported his findings in a formal written appraisal dated June 20, 1983. Therein he concluded that the fair market value of the subject property as a result of the conveyance of the scenic easement to the TCL was reduced in the amount of $114,00. This figure approximates the difference between the pre-easement value for the subject property which he calculated to be $694,000 (rounded) and the post-easement value which he calculated to be $580,000 (rounded).

We have carefully considered the testimony, including the written reports, of each of the three experts. We put little weight on Mr. Doubleday's testimony since, in our view, neither the comparables which he used to compute the pre-easement value of the property nor the comparables he used to compute the post-easement value of the property were reasonably indicative of the value of the property in the subject tract. Mr. Doubleday used the prop-

erties, which we have listed in our findings as sales nos. 1 through 13, to compute the pre-easement value of the Treanor Tract. Most of these tracts are smaller than the tracts into which Mr. Doubleday testified the Treanor Tract might feasibly be divided without expenditure of large sums for development of the property. At one point, Mr. Doubleday stated that solely because of the difference in size a 200-acre tract would sell per acre for approximately 70 percent of the per acre price of a 132-acre tract. While in our vie the evidence in this record does not support such a conclusion, it clearly appears to us that the tracts used by Mr. Doubleday as comparative of the pre-easement value of the property have not been shown to be comparable to the Treanor Tract or the smaller tracts into which it might feasibly be divided without large expenditures to subdivide the tract. In fact, the record shows that some of the tracts used by Mr. Doubleday as pre-easement comparatives were located in areas adjacent to residential property and that some were feasible for subdivision development with roadways and other improvements. Mr. Doubleday did not consider the highest and best use of the Treanor Tract to be for subdivision into 5-acre-or-less lots which would have required expenditures for roads and other improvements. However, it appears that certain of his comparables were in such tracts. The subdivision of the Ranchettes was done in 1963, and it required 16 years for sale of all but six of the lots. This is an indication that certainly as of June 1, 1977, the Treanor Tract would not have been suitable for a similar subdivision, although the possibility existed of such future subdivision of the property. Also, the sales that we have listed as Nos. 17 through 28 show other properties in Cheatham County selling in 1976, 1977 and 1978 at prices in the range of under $300 to around $500 an acre. Mr. Doubleday gave no explanation of why he did not use any of these properties as comparatives. We concluded that Mr. Doubleday picked as comparatives for the pre-ease-

ment value of the Treanor Tract properties which sold at relatively high prices without showing their comparability to the Treanor Tract.

Mr. Doubleday, for the post-easement value of the property, used isolated tracts of land which he considered to be sold for possible use of growth of timber. In our view, this does not give consideration to the highest and best post-easement use of the Treanor Tract.

For the value of the Ranchettes, Mr. Doubleday put primary weight on one sale in 1977 of a small 1.8 acre lot at $2,500 an acre. The record shows that no other lot in the Ranchettes sold for an amount approaching that price and that the lots purchased by petitioners themselves in the Ranchettes in 1977, which insofar as this record shows were purchased in arm's-length transactions, were bought for $339 to $514 an acre. BAsed on our analysis of the record, we do not consider Mr. Doubleday's valuation to be acceptable in determining the value of the easement granted by petitioners.

Respondent's witness, Mr. Johnson, used a different approach to valuation than either Mr. Doubleday or respondent's other witness, Mr. Donovan. Mr. Johnson concluded that the value before the after the easement was the same. He valued the Treanor Tract by applying comparables for woodland property to the wooded acres of the Treanor Tract, comparables of pastureland for valuing the pastureland in the Treanor Tract, comparables of cropland for valuing the cropland in the tract and comparables in the Ranchettes area for valuing the 81.51 acres of Ranchettes land.[11] To the $585,000 land value arrived

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[11] Mr. Johnson used the following comparables and method in determining his valuation of the land over which the easement was granted:

at by Mr. Johnson, he added $83,500 as the fair market value of improvements to determine a total fair market value prior to the granting of the easement of $668,500. Mr. Johnson' opinion was that the value of the land would not be affected by the granting of the easement. Although Mr. Johnson' approach differed from Mr. Donovan's approach, the amount he arrived at as the pre-easement value of the property appears to us to be reasonable. However, we cannot accept Mr. Johnson's opinion that the restrictions put on the land by the easement would in no way reduce its value. Mr. Johnson reached this conclusion by confusing the post-easement value of the land to Mr. Akers with the fair market value of the land to a willing buyer and seller, both being knowledgeable. Mr. Akers frankly admitted that he had no intention of selling the land but intended to keep it for himself and his children. The value

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Lot No.	Acres	Date of Sale	Price Per Acre (rounded)	Land Attributes
1	1,006.77	2/79	$645	Similar to Treanor Tract
2	134.48	3/79	600	Similar to Treanor Tract
3	132	12/77	550	Cropland
4	20.07	1/78	700	Cropland
5	44	3/78	500	Pastureland
6	28.1	4/77	890	Cropland
7	10.5	6/77	762	Buildable Site
8	15.14	10/76	842	Wooded
9	2.83	4/77	700	Similar to Ranchettes
10	2.8	Not Supplied	786	In Ranchettes

On the basis of these sales, Mr. Johnson estimated the value of petitioners' land on June 1, 1977, to be as follows:

1,151.15	acres of woodland at $400/acre	= $460,460
45	acres of pastureland at $550/acre	= 24,750
65	acres of cropland at $650/acre	= 42,250
81.51	acres of buildable sites at $700/acre	= 57,057
1,342.66	acres	$584,517 (rounded to $585,000)

of the land to Mr. Akers is not necessarily its fair market value. Considering the testimony of the other two experts, we conclude from the record as a whole that a willing buyer of the land after the granting of the easement would pay less for it than he would have paid before the granting of the easement, and a willing seller would sell it for less after it was encumbered by the easement. The restrictions clearly affected any potential use of the land for subdivision into small lots in the event the area become appropriate for such subdivision before the expiration of the easement's 30-year life.

We are persuaded from Mr. Donovan's valuation of the property berfor and after the granting of the easement that his determinations reasonably reflect the respective values. Mr. Donovan, in his pre-easement valuation of the Treanor Tract, gave primary weight to the sales of two tracts (nos. 14 and 15 set forth in our findings), one of which was a little over 1,000 areas and the other a little over 1,400 acres. These tracts are reasonably comparable to the Treanor Tract before the granting of the easement. Mr. Donovan justified the use of these larger tracts as comparables (although he considered the highest and best use of the property to be in tracts of 50 to 200 acres for use as vacation retreats) because of the ease with which they could be divided into smaller tracts. He also supported his valuation with sales of a number of smaller tracts at relatively the same per acre price as the larger tracts. From our view of the various sales placed in the record, we conclude that Mr. Donovan's estimate of the pre-easement value of the Treanor Tract is a reasonable one. We also note that his pre-easement value of the property is very close to that of Mr. Johnson's who also considered the sales prices of various properties in the area which had been sold around June 1, 1977, with adjustments for earlier or later dates. We likewise consider Mr. Donovan's valuation of the improvements on the property to be reasonable.

Mr. Donovan valued the 81.51 acres owned by petitioners in the Ranchettes at $1,000 per acre. In our view, the valuation is on the high side, considering the fact that petitioners themselves had purchased lots in 1977 in the Ranchettes for an average of less than half that price per acre. However, Mr. Donovan, in making his estimate, considered the sale in March 1977 of a 1.8 acre lot for $2,500 an acre along with other sales of lots in the Ranchettes. We do not consider the isolated sale at $2,500 per acre to be indicative of market value when the experts were unable to explain why this price was so much higher than the price at which any other Ranchettes property was sold. However, valuation is not an exact science and since we consider Mr. Donovan's overall pre-easement valuation as reasonable, we accept it.

For the post-easement valuation Mr. Donovan relied primarily on one sale of a tract of 2,200 acres which he considered to be usable in the foreseeable future only for vacation retreats, and to this he added some amount for the potential value of the Treanor Tract after the 30-year easement expired. Viewing the record as a whole, we conclude that Mr. Donovan's post-easement valuation of the Treanor Tract, as well as his post-easement valuation of the Ranchettes which he considered would have a highest and best use as picnic areas or side yards to adjoining properties, to be a reasonably judgment. The post-easement valuation of the Ranchettes as made by Mr. Donovan is very close to the per acre amount paid by petitioners for the lost they bought in 1977 in the Ranchettes area prior to granting the easement. We were likewise favorably impressed by Mr. Donovan's valuation of the improvements on the property which he determined from estimated construction cost less depreciation. Mr. Donovan concluded that the pre-easement and post-easement values of the improvements would be the same since the improvements were built to be used primarily as vacation retreats, and the highest and best post-easement use of

the property was as vacation retreats. In fact, the easement may benefit such use of the property. In any event, we agree with Mr. Donovan that the easement affects only the value of the land, not the value of the improvements.

Valuation is not an exact science and cannot be determined with mathematical precision. It is a subjective determination which requires the exercise of our best judgment considering all the facts and circumstances of record. *Messing v. Commissioner*, 48 T.C. 502, 512 (1967). Based on the record as a whole, we conclude that Mr. donovan's opinion of the value of the easement is a reasonable one. Based on Mr. Donovan's appraisal, as well as the record as a whole, we conclude that the fair market value of the easement granted by petitioners to the TCL on June 1, 1977, was $114,000.

Decision will be entered
Under Rule 155.

APPENDIX B

UNITED STATES TAX COURT

Docket No. 14435-81

WILLIAM B. AKERS and JOANN AKERS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Court filed September 12, 1984, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax due from the petitioners for the taxable years 1977, 1978, and 1979, in the amounts of $4,087.41, $58,225.98, and $45,012.48, respectively.

(Signed) Irene F. Scott

Judge

Entered: Dec 11 1984

* * * *

APPENDIX C

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24
No. 85-1127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM B. AKERS and JOANN AKERS,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court.

Decided and Filed August 20, 1986

Before: LIVELY, Chief Judge; an JONES and NELSON, Circuit Judges.

PER CURIAM. Mr. & Mrs. William B. Akers gave to a charity a "scenic easement" burdening some 1340 acres of land they own in Cheatham County, Tennessee. Their appraiser concluded that the easement had a fair market value of $772,000, and they used that valuation in determining their charitable deductions for federal income tax purposes. The Internal Revenue Service disallowed the deductions, and the Akers petitioned the Tax Court for relief. On the basis of an appraisal made by a witness for IRS, the Tax Court concluded that the easement had a fair market value of $114,000. Tax deficiencies were determined accordingly, and the Akers have appealed the Tax Court's decision. We are not persuaded that the Tax

Court's valuation was erroneous, and we shall therefore affirm the decision.

Most of the Akers' acres were acquired through the purchase in 1965, of a large parcel of unimproved land known as the Treanor Tract. That tract, the timber on which had recently been cut, contains approximately 1,261 acres. It is adjacent to a parcel subdivided in 1963 into 600 lots (called "Ranchettes" by the subdivider), each containing only a few acres. Between 1970 and 1977, the Akers supplemented their holdings by purchasing 31 Ranchettes containing a total of approximately 82 acres.

The Treanor Tract consists of wooded ridges and hollows, with some creek-bottom farmland. The Akers built an A-frame vacation house on the tract in 1969, and Mr. Akers' brother built a similar house there in 1973. The houses have septic tanks and are supplied with water from wells on the property.

In 1977 the taxpayers granted a scenic easement over the land to a public charity called the Tennessee Conservation League. "The easement was granted for the scenic enjoyment of the public as well as the conservation and protection of the natural environmental systems on the property." *William B. Akers,* ¶ 84,490 P-H Memo TC (1984) at 1964-84. The easement provides, among other things, that only one family dwelling unit can be erected for each 200 acres, and that there can be no excavation, topographical changes, or removal of trees without permission of the Conservation League.

The grant of the easement was a "charitable contribution" within the meaning of 26 U.S.C. § 170(c). The regulations provide that "the amount of the contribution is the fair market value of the property," and "[t]he fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and

both having reasonable knowledge of the relevant facts." 26 C.F.R. § 1.170A-1(c)(1) and (2).

The parties agreed that the value of the scenic easement was to be measured by "the difference between the fair market value of [the Akers' acreage] immediately before the scenic easement was granted and the fair market value of the property immediately after the scenic easement was granted." *William B. Akers, supra,* at 1968-84. That approach was adopted by the Tax Court. The only element in this calculation as to which there is any significant dispute is the pre-easement value of the Treanor Tract. The parties are basically in agreement on its post-easement value, on the value of the two A-frame houses, and on the pre-easement and post-easement value of the 31 Ranchettes.

The price at which the Akers bought the Treanor Tract in 1965 was $125,000, or slightly under $100 per acre. In 1969 the Cheatham County Tax Office appraised the property for real estate tax purposes at $196,480. IRS offered two appraisal reports at the trial, one of which—that of Dennis H. Donovan—was accepted by the Tax Court as fixing the proper value of the easement. Mr. Donovan put the pre-easement value of the Treanor Trace, exclusive of buildings, at $505,00, or approximately $400 per acre. The taxpayers' appraiser, Mr. B.B. Doubleday, Jr., almost doubled Mr. Donovan's figure; Mr. Doubleday said the pre-easement value was $971,000, or approximately $770 per acre.

Both appraisers relied on comparable sales, but they disagreed over what sales were comparable. Mr. Donovan identified two large tracts, each containing over 1,000 acres and both in the same area as the Akers' acreage, one of which had been sold in December of 1973 at an estimated $279 per acre, exclusive of buildings, and the other of which had been sold in February of 1979 at an estimated price of $536 per acre, exclusive of buildings. Mr. Donovan

considered these the "most comparable" sales and gave them the most weight in arriving at his $400 per acre appraisal.

The taxpayers' evidence showed that but for the grant of the easement the Treanor Tract could readily have been subdivided into 24 lots averaging 52.5 acres each. Appraiser Doubleday looked for sales of lots comparable to these 24 theoretically subdivided lots, and he discovered 13 more or less comparable sales at prices averaging $770 per acre. Mr. Doubleday considered that figure most representative of the pre-easement value of the Treanor Tract.

The difference between the two valuations thus boils down to a difference between the worth of the Treanor Tract prior to subdivision and the worth of the land at some point afterwards. It is rather like the difference between the worth of a gravid or potentially gravid sow and the postpartum worth of sow-cum-shoats.

II

It would not be appropriate to place undue emphasis on semantics, but we note in passing that the regulatory definition of fair market value speaks of "the" price at which "the" property would change hands between "a" willing buyer and a willing seller. It is undisputable that the Treanor Tract was a single property immediately prior to the grant of the easement, and the regulatory definition does suggest that the appropriate question is what a hypothetical Malcolm Forbes would have paid for it as one tract, rather than what two dozen hypothetical yuppies would have paid for it as 24 "Ranchettes."

The legal precedent that we find most helpful, and that we elect to follow, is *Anselmo v. Commissioner of Internal Revenue,* 757 F.2d 1208 (11th Cir. 1985). The taxpayer in that case had bought several hundred low-quality South American gemstones for $15,000. After holding them for nine months (the gestation period then required for pro-

ducing "capital gain property" that could be contributed to charity on a fully tax deductible basis), the taxpayer donated the stones to the Smithsonian Institution and claimed a charitable deduction of more than $80,000. The taxpayer's appraiser theorized that the value of the stones should be determined by reference to the retail market. Because such stones are not normally retailed unmounted, the appraiser looked to the retail price of finished pieces of jewelry containing such stones, deducted the scrap value of the mountings, and treated what was left as the fair market value of the stones. The Tax Court rejected that approach, holding that the stones should have been valued at what a jewelry store owner or jewelry manufacturer would have paid for unmounted stones of comparable quality. The Court of Appeals for the Eleventh Circuit affirmed, treating the question of which market was relevant for valuation purposes as a question of fact, not a question of law. The Tax Court's finding that the individual consumer does not normally purchase low-quality gems unmounted was not clearly erroneous, the Court of Appeals held, and the Tax Court therefore did not err in rejecting a valuation determined by reference to a market where unmounted gems are seldom sold.

In the case at bar the Tax Court has determined that the market most appropriately used in estimating the value of the Treanor Tract is the market for large tracts of over 1,000 acres, and not the market for properties averaging less than a tenth that size. Far from being clearly erroneous, that determination seems clearly correct.

The person who goes shopping for a 50 acre parcel of land resembles, in some respects, the person who goes shopping for a finished item of jewelry. The "ultimate consumer" of jewelry does not normally have the time, inclination, or expertise to buy a low-quality gem and have a piece of jewelry designed and built around it. The "ultimate consumer" of a 50 acre lot, similarly, does not normally have the time, inclination, expertise or capital to

buy a tract of land 10 or 20 times as big as the one he wants, with a view to subdivision and sale of the excess.

The significance of the large amount of capital required for purchase of the Treanor Tract as a whole may come into clearer focus when we consider the amount of time likely to be consumed in dividing the property into 24 lots and disposing of those lots individually. That is not the kind of marketing project that can be completed overnight. The testimony in this case established that it took 16 years for the subdivider of the land adjacent to the Treanor Tract to sell substantially all of the subdivided lots. Those lots were, to be sure, much smaller and more numerous than the lots into which the Treanor Tract would have been divided, but it is not unrealistic to suppose that several years—and a fair amount of professional and quasi-professional effort—might have been consumed in disposing of two dozen Treanor Tract lots at anything like $770 per acre. During that time, of course, there would always have been a risk that the market might turn, and the market for raw land does sometimes turn down, as recent experience shows, as well as up. Such considerations strongly suggest that the Tax Court was correct in accepting a valuation based on sales of tracts comparable in size to the Treanor Tract, rejecting a valuation based on prices commanded by much smaller lots.

Taxpayers cite *Estate of Elizabeth Schultz Rabe*, ¶ 75,026 P-H Memo TC (1975), for the proposition that a large tract of land (470.5 acres in that case) should be valued as if subdivided. There, however, the subdivision analysis was used only as a means of double-checking a valuation figure arrived at by another type of analysis. Unlike appraiser Doubleday, moreover, the appraiser who used a subdivision analysis in *Estate of Rabe* did attempt to factor in the costs of subdividing the property and holding it for sale over a period of time.

> "While [the appraiser] could find no substantially similar properties, he considered the differences and similarities between each sale of similar properties and the subject property and made proper adjustments. He placed primary reliance on this method, but double checked his conclusions through a computation based on a subdivision analysis of the property. This latter computation was detailed and utilized the present value of the expected gross return (based on a gross profit of 100 percent on raw land sales), discounted for a ten-year holding period. He used sales prices and development costs based on those of other similar subdivisions in the area." ¶ 75,026 P-H Memo TC at 75-117.

It remains to be considered whether the decision in *Goldman v. Commissioner of Internal Revenue*, 388 F.2d 476 (6th Cir. 1967), requires us to reverse the decision of the Tax Court here. The property that was given to charity in *Goldman* consisted of 151 bound volumes of various medical journals. One of the questions presented to the Tax Court was whether the fair market value of the books was the price that an ultimate consumer could be expected to pay for them or the price that would be paid by a dealer purchasing the books for resale. The Tax Court stated that the books should be valued at retail rather than at wholesale, but accepted a relatively low valuation offered by an IRS witness who seems to have contradicted himself on whether he was giving the books a retail value or a wholesale value. In declining to overturn the Tax Court's determination as "clearly erroneous," thus rejecting the taxpayer's claim that the books had been undervalued because of the Tax Court's putative use of an irrelevant market, this court stated:

> "We hold that where a deductible charitable contribution is made in property other than money, the allowable deduction is the fair market value

> computed on the price an ultimate consumer would pay, and that what might be paid by a dealer buying to resell is not a proper consideration." 388 F.2d at 478.

The affirmance of the Tax Court's decision in *Goldman* does not require a reversal of the Tax Court's decision here. The books that were given away in *Goldman* had already been "subdivided," in effect. Unlike the unmounted gems in *Anselmo,* and unlike the undivided Treanor Tract, the medical books were ready for immediate sale in the retail market and were not so expensive as to suggest that no retail buyer for them could have been found. The statement of the grounds on which *Goldman* was decided may have been broader than necessary, but given the facts in *Goldman,* the holding in that case does not undermine the decision reached by the Tax Court here. We consider the Tax Court's decision correct, and it is hereby AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-1127

WILLIAM B. AKERS and JOANN AKERS,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Before: LIVELY, Chief Judge; and JONES and NELSON, Circuit Judges.

JUDGMENT

ON APPEAL from a decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of record from the said Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause b and the same is hereby affirmed.

It is further ordered that Respondent-Appellee recover from Petitioners-Appellants the costs on appeal, as itemized below, and that execution therefore issue out of said court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN,
Clerk

Issued as Mandate: September 11, 1986 A True Copy.

COSTS: NONE Attest:

Filing fee.....$
Printing .....$

/s/ TOM BENINFWIS
Deputy Clerk

Total.....$

Supreme Court, U.S.
FILED
FEB 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-864

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM B. AKERS ET UX., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erred in affirming the Tax Court's determination of the fair market value of a scenic easement conveyed by petitioners to a charitable organization.

1. Petitioners were the owners of a large tract of land in Cheatham County, Tennessee, known as the Treanor Tract. This 1261-acre tract was improved by two vacation homes, one of which was occupied by petitioners and the other by their relatives. Pet. App. 23a-24a. In 1977, petitioners granted a 30-year scenic easement covering this property to the Tennessee Conservation League, a qualified charitable organization under Section 170(c) of the Internal Revenue Code.[1] Under the provisions of the scenic easement, petitioners pledged not to construct any more than six single-family residences on the property. All new structures, as

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

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well as alterations to existing structures, changes to access roads, excavations, plantings, removal of trees, and changes in the use of the property, were subject to review by the Tennessee Conservation League. The League could disapprove such changes if they threatened to interfere with the preservation of the natural environment as it existed when the easement was granted. At the end of the 30-year term, petitioners' interest in the property would return to being unencumbered by the easement. Pet. App. 2a-4a.

On their joint federal income tax returns for 1977, 1978 and 1979, petitioners claimed charitable deductions for the gift of this easement in the amounts of $110,648, $103,240, and $68,536 respectively.[2] The Commissioner disallowed these deductions on the ground that petitioners had failed to establish the fair market value of the easement at the time it was granted. Pet. App. 11a.

Petitioners sought redetermination of the resulting deficiencies in the Tax Court. Both sides offered expert testimony from knowledgeable real estate appraisers concerning the value of the easement on the Treanor Tract. Petitioners' expert, Benjamin B. Doubleday, valued the easement at $772,000. He reached this value by deducting his estimate of the post-easement fair market value of the property from his estimate of the property's value unencumbered by the easement. In determining the unencumbered value of the 1261-acre Treanor Tract, Doubleday used the "market data" approach to valuation and selected as comparable sales 13 sales of property consisting of smaller tracts ranging from five acres to 132 acres in size. In

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[2]Petitioners were precluded by the percentage limitations of Section 170(b)(1) from claiming a charitable deduction in excess of $110,648 on their 1977 return. The amounts claimed on their returns for 1978 and 1979 were carryovers of the excess amount from 1977. See I.R.C. § 170(d)(1); Pet. App. 11a.

determining the post-easement value of the Treanor Tract, Doubleday relied primarily on sales of isolated tracts with little subdivision potential, which were marketable primarily as timberland. Pet. App. 14a-17a.

The Commissioner offered the expert testimony of two appraisers. Paul Johnson, one of the Commissioner's expert witnesses, was a real estate appraiser employed by the Internal Revenue Service. He testified that the pre-easement value of the property, which he found to be $668,500, was undiminished by the grant of the easement because the highest and best use of the property, both before and after the grant of the easement, was for secluded vacation retreats. In his opinion, the easement did not impair this use and actually enhanced it by assuring privacy to the owners of such retreats. Accordingly, Johnson concluded that the value of the easement was zero. Pet. App. 13a-15a.

Dennis H. Donovan, the Commissioner's second expert witness, concluded that the grant of the easement caused a slight reduction in the fair market value of the Treanor Tract because it restricted the subdivision potential of the land during the easement's 30-year term. In determining the pre-easement value of the property, Donovan gave primary weight to two sales of large tracts of land in the general vicinity of the Treanor Tract that he found to have been comparable to the subject property in terrain, road access, and subdivision potential. For the post-easement value of the Treanor Tract, Donovan relied primarily on one sale of a 2,200-acre tract with limited subdivision potential. By comparing these sales and adjusting for the value of the reversion of the Treanor Tract at the end of the 30-year easement, Donovan concluded that the easement had a value of $114,000. Pet. App. 15a, 19a-20a.

The Tax Court found that the easement had a value of $114,000. The court found that Donovan's analysis of the comparable sales was the most reasonable of the three presentations by the expert witnesses, and it accepted his conclusion as to the value of the easement. Pet. App. 19a-21a. In rejecting Doubleday's estimate of $772,000 for the value of the easement, the court pointed out that Doubleday had treated sales of tracts as small as five acres as comparable to the 1261-acre Treanor Tract without adjusting for the large expenditures required to subdivide it, to build roads and improvements, and to market a large number of small parcels (*id.* at 15a-17a). Conversely, the court rejected Johnson's conclusion that the value of the tract was unaffected by petitioners' granting of the easement, pointing out that the easement had an adverse effect on the potential of the land for subdivision at any time during the 30-year life of the easement (*id.* at 18a-19a).

The court of appeals unanimously affirmed in a per curiam decision (Pet. App. 23a-30a). The court noted that both Donovan and Doubleday had relied on "comparable sales" in valuing the Treanor Tract, but that they had disagreed on what sales were truly comparable (*id.* at 25a). The court accepted as "clearly correct" the Tax Court's finding that Donovan had selected the appropriate "comparable sales" by analyzing sales of other tracts containing 1,000 or more acres each, rather than sales of tracts "averaging less than a tenth that size" (*id.* at 27a).

3. The court of appeals' decision turned on whether the Tax Court's factual finding as to the value of the donated easement was erroneous. That finding depended upon which expert witness's testimony was found to be most convincing—a matter peculiarly within the province of the trier of fact, whose decision should not be disturbed except for an abuse of discretion. See, *e.g.*, *Palmer* v. *Commissioner*, 523 F.2d 1308, 1310 (8th Cir. 1975). For the reasons

well stated by the court of appeals (see Pet. App. 25a-30a), the Tax Court's judgment that Donovan's expert testimony was the most credible was a sound one. In any event, the court of appeals' decision presents no issue warranting the attention of this Court.

Petitioners struggle in vain to paint the decision below as one based on legal rather than factual grounds. They assert (Pet. 13-17, 21-23) that the decision conflicts with several Tax Court decisions, most of which petitioners did not even cite to the court of appeals. Even if there were such a "conflict," a conflict between the Tax Court and a court of appeals would not necessitate this Court's intervention. See Sup. Ct. R. 17. In any event, the premise of petitioners' assertion is mistaken because the decision below is fully consistent with the state of the law in the Tax Court. Indeed, the decision below *affirmed* a decision of the Tax Court.

Petitioners' contention (Pet. 10-11, 18-24) that the court of appeals committed legal error by assertedly failing to follow the applicable Treasury Regulation, 26 C.F.R. 1.170A-1(c)(2), is wholly without merit. Both courts below applied the test of that regulation for determining "fair market value," since each court undertook to ascertain "the price at which the property would change hands between a willing buyer and a willing seller" (*ibid.*). That inquiry was the subject of the expert testimony that formed the basis for the Tax Court's finding as to the easement's fair market value, a finding that was affirmed by the court of appeals. The regulation plainly does not establish a general rule that the market value of a large parcel of land is to be determined by comparing it to the values received upon the sale of small, subdivided parcels used for residences. Indeed, as the court of appeals noted (Pet. App. 26a), the text of the regulation indicates precisely the contrary.

As the court of appeals also explained (Pet. App. 26a-27a), the decision on which petitioners place primary reliance, *Anselmo* v. *Commissioner*, 757 F.2d 1208 (11th Cir. 1985) (see Pet. 21-23), in fact strongly supports the valuation approved by the courts below. In that case, the Tax Court and the court of appeals held that a donation of a large quantity of unfinished gems should be valued by reference to the wholesale market—*i.e.*, by reference to the price that a jeweler would pay for the uncut stones, not to the price that the ultimate consumer would pay for them once they had been finished and mounted. Similarly here, the relevant market for petitioners' large tract of land was the wholesale market of developers or other purchasers of large parcels, not homeowners who purchase small, subdivided lots.

This conclusion obviously accords with common sense. When a large parcel of land is put up for sale, it is most likely that it will be purchased as a unit. It would be quite unrealistic for someone who places a 1261-acre parcel on the market to expect hundreds of potential homeowners to approach him and purchase small bits of the tract. Rather, the market he could expect to respond to the sale offer would consist of persons who would purchase the whole tract (perhaps with a view to subdividing it eventually and offering smaller parcels for sale). Finally, the *Anselmo* case confirms that the valuation issue presented here is "a question of fact," not a question of law (757 F.2d at 1213).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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